

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-727

ABRAHAM KASPARIAN, JR.

vs.

CONSTANCE MARIE SANTINELLO (and two companion cases¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Abraham Kasparian, Jr. (Kasparian),² appeals from judgments entered against him after cross motions for summary judgment in five consolidated Superior Court actions he commenced.³ He limits this appeal to certain aspects of his claims against his former wife Constance Marie Santinello (Santinello) only, expressly waiving all other claims against

¹ The companion cases involve the same parties, as well as defendants not involved in the appeals.

² Kasparian, although pro se, is an experienced litigant. His arguments on appeal are inadequately briefed, difficult to understand, and do not satisfy the requirements of Mass. R. A. P. 16, as appearing in 481 Mass. 1628 (2019). Nonetheless, we have carefully reviewed his submissions, and have afforded him oral argument.

³ Civil action numbers 09-00281, 11-00246, 11-00250, 11-00263, and 11-00518 were consolidated below. Kasparian took appeals only on 11-00246, 11-00250, and 11-00263 -- and only as to his former wife. We consolidated the three appeals.

all other defendants. In brief, he argues that summary judgment should not have entered in Santinello's favor on his contract, fraud, or fiduciary duty claims, and that the Superior Court judge should have held an evidentiary hearing on his claim for "secondary liquidated damages." The claims all relate to a separation agreement (agreement) the parties entered into and that was incorporated, but did not merge, into a judgment of divorce nisi. We affirm.

1. Evidentiary hearing regarding "secondary liquidated damages." Kasparian argues that he was entitled to an evidentiary hearing with respect to his motion seeking to recover liquidated damages under section 12 of the agreement⁴ as costs pertaining to his claim for erroneously allocated accounting fees. We begin by briefly describing the pertinent background.

The receiver appointed pursuant to the agreement erroneously deducted the entire amount of accounting fees from Kasparian's October 2004 disbursement when, instead, those costs

⁴ "12. Court Costs and Counsel Fees In Event Of Breach: If either the Husband or the Wife shall commit a breach of any of the provisions of this Agreement and legal action shall be reasonably required to enforce such provisions and be instituted by the other, the party in breach shall be liable for all Court costs and reasonable counsel fees incurred in instituting and prosecuting such action. Furthermore, if Husband or Wife shall fail to comply with any of the provisions of this Agreement or requests from the Receiver then and in that event they shall forfeit any proceeds due under Step II and Step III."

should have been split equally between the parties. The receiver's error resulted in an overpayment to Santinello. To rectify the error, a judge sitting in the Middlesex division of the Superior Court Department (Middlesex judge) ruled in 2009, in action 11-00250, that Santinello, "with respect to her agreed contribution to the accountant fees," "owes [Kasparian] \$4,035.00."⁵ Later, on December 10, 2013, a Superior Court judge sitting in Hampden County on the then-consolidated actions (Hampden judge) allowed Kasparian to seek "all Court costs incurred in instituting and prosecuting" his claim for the erroneously allocated accounting fees (count V). A summary judgment then entered on count V on June 23, 2014, in the amount of \$4,035 plus costs. The Hampden judge denied Kasparian's request that liquidated damages under section 12 of the agreement be assessed as part of his recovery on count V. Kasparian now argues that the motion should not have been denied without an evidentiary hearing.

Whatever else might be said about Kasparian's argument, it fails because there is nothing to indicate that Santinello

⁵ This was the amount Kasparian claimed. He moved in 2015, after entry of a summary judgment, to amend the amount to \$4,535, which was the proper calculation of half of the accounting fees, but a judge denied the motion as untimely. To the extent that ruling is properly before us, Kasparian has shown no abuse of discretion on the part of the judge, and we therefore affirm the denial of the motion to amend.

"fail[ed] to comply with any of the provisions of th[e] Agreement or requests from the Receiver" (as required in section 12) with respect to the receiver's erroneous overpayment in her favor.⁶ Kasparian has not pointed to any provision of the agreement -- nor have we found one -- that required Santinello to fix an accounting error made in her favor by the receiver. See Tompkins v. Tompkins, 65 Mass. App. Ct. 487, 494 (2006) (separation agreement reviewed de novo, gathering intent of parties "from a fair construction of the contract as a whole" [citation omitted]). Nor has Kasparian produced any evidence to suggest that Santinello failed to comply with any requests from the receiver with respect to the overpayment. In short, Kasparian has failed to put forward any evidence that the factual predicates exist for forfeiture of Step II and Step III proceeds under section 12 of the agreement. In these

⁶ We recognize that the Hampden judge characterized the defendants as having been "in breach" with regard to the \$4,035. But the record does not support this characterization. The Middlesex judge did not so rule, nor could he have, as that question was not before him: Kasparian moved only for a judgment that Santinello turn over \$4,035 that she obtained due to the receiver's error in her favor. The portion of the hearing transcript provided on appeal includes no discussion of action or inaction by Santinello, and the lower court docket notes, "the Defendant, Weitz has agreed that an error in calculation was made in the accountancy fees which has been cured by the entry of partial Summary Judgment" on December 18, 2009.

circumstances, the Hampden judge was not required to conduct an evidentiary hearing.

2. Remaining arguments. Kasparian also challenges the summary judgment against him on certain of his breach of contract and breach of fiduciary duty claims, arguing that material facts are in dispute such that summary judgment was inappropriate. See Twomey v. Middleborough, 468 Mass. 260, 267 (2014), citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) ("Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law"). As the parties cross-moved for summary judgment, we review the judgment de novo, "viewing the evidence in the light most favorable to the unsuccessful opposing party [Kasparian] and drawing all permissible inferences and resolving any evidentiary conflicts in [his] favor." Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 448 (2018), citing Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 756 (2010). Further, in our de novo review of the separation agreement, "we must construe the agreement in a manner that 'appears to be in accord with justice and common sense and the probable intention of the parties . . . [in order to] accomplish an honest and straightforward end [and to avoid], if possible, any construction of a contract that is unreasonable or inequitable.'" Krapf v. Krapf, 439 Mass. 97,

105 (2003), quoting Clark v. State St. Trust Co., 270 Mass. 140, 153 (1930).

a. Breach of contract and breach of fiduciary duty relating to the maintenance of the Weir Road property.

Kasparian argues that there is a dispute of material fact as to whether Santinello breached the separation agreement and her fiduciary duty to him when she "cause[d] damage or allowed the [Weir Road] property to fall into disrepair" prior to the negotiation and execution of the separation agreement. However, no provision in the separation agreement imposes an obligation -- retroactive or prospective -- on Santinello relating to the maintenance of marital property. Nor has Kasparian identified such a provision or argued that any language in the agreement could be so interpreted. See Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998) ("A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one"). Further, because Santinello had no contractual obligation to Kasparian stemming from the separation agreement regarding the maintenance of the Weir Road property, her fiduciary duties to him as a coparty to the agreement are not implicated. See Krapf, 439 Mass. at 103 ("Parties to a separation agreement stand as fiduciaries to each other, and

will be held to the highest standards of good faith and fair dealing in the performance of their contractual obligations").

b. Breach of contract relating to the transfer of the Weir Road property and the airplane. Kasparian argues that there are disputed issues of fact as to whether Santinello breached section 9⁷ (entitled "Documents") and section 13⁸ (entitled "Proof of Compliance") of the separation agreement by failing timely to transfer title to the Weir Road property and to the airplane.⁹ We agree with the Hampden judge's view that Kasparian failed to show that he had been harmed by the alleged delays and

⁷ Section 9 provides,

"Documents: Whenever called upon to do so by the other party, each party shall forthwith execute, acknowledge and deliver to or for the other party without consideration any and all deeds, assignments, bills of sale or other instruments that may be necessary or convenient to carry out the provisions of this Agreement, or that may be required to enable the other party to sell, encumber, hypothecate, or otherwise dispose of the property now or hereafter owned or acquired by such other party."

⁸ Section 13 states,

"Within thirty (30) days after the execution of this Agreement, each party shall exhibit to the other or to his or her counsel satisfactory written evidence that the transfer and other actions required by this Agreement have been duly carried out insofar as they require action by either party."

⁹ We are unpersuaded by Kasparian's argument that the Hampden judge erred in ruling that the issue of Santinello's alleged nontransfer of the motorcycle should be pursued in the criminal case in which the transfer was ordered.

therefore could not maintain a contract claim. See Singarella v. Boston, 342 Mass. 385, 387 (1961) (damages an element of breach of contract action); Hanover Ins. Co. v. Sutton, 46 Mass. App. Ct. 153, 163-164 (1999) (proof of damages required to prevail in breach of fiduciary duty action).

However, Kasparian also argues that he raised a triable issue of fact about whether the alleged delay in transferring the assets triggered the liquidated damages provision of section 12 of the agreement, see supra. The record reflects that Santinello's attorney sent Kasparian a letter purporting to attach two original deeds to the Weir Road property on November 23, 2004, 112 days after the separation agreement was executed. Kasparian asserts that copies, not originals, of the deeds were enclosed. In the final analysis this dispute does not matter because Kasparian accepted the documents at the time and held them for nine months with no objection. See Krapf, 439 Mass. at 105 (construing agreement terms in way that is reasonable and equitable). To the extent Kasparian claims that, even after he notified the receiver and Santinello's attorney in October 2005 that he had not received the required original documents, it was another six months before the receiver recorded the deeds, there is nothing to suggest that this delay was chargeable to Santinello.

As for the airplane, it was undisputed that the airplane title has always been in Kasparian's name, and that Santinello has never held title to the airplane. Therefore, the record did not raise a triable issue that transfer of the airplane to Kasparian required some action on Santinello's part under section 13 of the agreement. We note further that Kasparian acknowledged in his summary judgment papers that Santinello provided him with the airplane-related documents in her possession in 2002, and that it was her attorney, and not she, who was responsible for a delay in completing forms that Kasparian requested in 2007.

Kasparian also argues that Santinello breached the separation agreement by not timely releasing her lien on the airplane, or securing the release of Kasparian's partner interest in the airplane. However, we agree with the Hampden judge that the separation agreement did not impose these obligations on Santinello. Nor did the separation agreement require her to maintain the airplane. Maintenance of the marital estate, under the plain terms of the agreement, fell to the receiver, not Santinello. See Balles v. Babcock Power Inc., 476 Mass. 565, 571-572 (2017) ("When contract language is unambiguous, it must be construed according to its plain meaning").

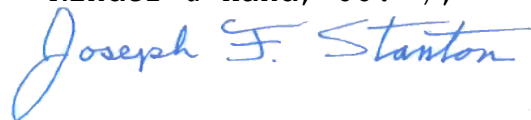
c. Breach of fiduciary duty and fraud relating to negotiation of the separation agreement. Finally, Kasparian argues that there are disputed issues of material fact as to whether Santinello misled him during the negotiations leading to the separation agreement.¹⁰ However, the underlying civil actions were not the place to mount this "impermissible collateral attack" on the Probate and Family Court judgment of divorce (which incorporated the agreement). The proper time and place for such a claim was an appeal from that judgment. See Tompkins, 65 Mass. App. Ct. at 493, citing Pavlik v. Dmytryck, 6 Mass. App. Ct. 915, 916 (1978) ("where final judgment ha[s] entered," rights of parties are "limited to timely appeal or

¹⁰ Kasparian's assertion that Santinello breached the implied covenant of good faith and fair dealing consists of two sentences, is raised without reference to any portions of the record, and fails to rise to the required level of appellate argument. We accordingly need not, and do not, address it. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993) ("bald assertions of error, lacking legal argument and authority," do not rise to level of appellate argument); Donovan v. Gardner, 50 Mass. App. Ct. 595, 602 (2000) (conclusory statements in brief do not rise to level of appellate argument).

other direct challenge").¹¹

Judgments affirmed.

By the Court (Wolohojian,
Kinder & Hand, JJ.¹²),



Clerk

Entered: August 2, 2019.

¹¹ We deny Santinello's request for fees and costs made on the ground that this appeal is frivolous.

¹² The panelists are listed in order of seniority.